INTERIOR BOARD OF INDIAN APPEALS

Estate of Clara Whitehip

10 IBIA 107 (09/29/1982)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF CLARA WHITEHIP

IBIA 82-9 Decided September 29, 1982

Appeal from order by Administrative Law Judge Daniel S. Boos denying petition to reopen estate (Probate IP-BI-16B-82 (D-104-61)).

Affirmed.

1. Indian Probate: Reopening: Generally

A petition to reopen the probate of an Indian trust estate must, to be favorably considered, present some legal theory and the factual basis set out in supporting documentation to support the claimed relief.

APPEARANCES: Thomas R. Acevedo, Esq., for appellants Clara Turner, Raphael Whitehip, Ada Whiteman Rides Horse, Vincent Whitehip, Jerome Whitehip, and Virginia Whitehip; James E. Seykora, Esq., for appellee William T. Shaw, Jr.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On October 30, 1961, an order issued approving will and distributing estate in decedent Clara Whitehip's estate. On October 15, 1981, appellants Clara Turner, Raphael Whitehip, Ada Whiteman Rides Horse, Vincent Whitehip, Jerome Whitehip, and Virginia Whitehip, decedent's grandchildren, petitioned to reopen the probate of decedent's trust estate. Citing Estate of Wellknown, 78 I.D. 179 (1971), petitioners allege a devise to appellee William T. Shaw, Jr., a non-Indian, was erroneously approved as a matter of law by the examiner of inheritance at the 1961 proceeding. 1/ The record on appeal shows that appellee, a non-Indian, was the devisee of a portion of the Indian trust lands belonging to decedent at the time of her death in 1960.

Appellants contend the Wellknown decision is directly applicable to the probate of decedent's estate. In Wellknown this Board held the factual situation found to have been proved at hearings into the estate merited the exercise of Secretarial discretion to disapprove a devise of trust lands

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1/ Notice of Appeal at 3, 6.

to two non-Indian devisees, one of whom was appellee William T. Shaw, Jr. The opinion in Wellknown relies upon language in the concurring opinion of Mr. Justice Harlan in Tooahnippah v. Hickel, 397 U.S. 598 (1970), to support disapproval of the devise to the non-Indians.

Although appellants seek a similar ruling in this appeal, they offer no supporting documentation in support of their claim for relief. No brief in support of the notice of appeal has been filed. No affidavits or offers of proof concerning expected testimony to be offered at a hearing on reopening are submitted, either in support of the petition to reopen or in support of this appeal from the order denying petition. The record is entirely silent concerning any factual basis which might justify the exercise of Secretarial discretion in this estate to set aside the devise to appellee. 2/

[1] As the Administrative Law Judge noted in his order denying petition for reopening, devises to non-Indians of Crow Indian trust property are not illegal. Such interests are not inherited in trust status, however. A mere showing that a devise was made to a non-Indian, without some showing to establish a factual basis for finding that it was error to approve the devise, is insufficient to permit an order reopening an estate closed for 20 years. 3/

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed.

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2/ It is noted that one of decedent's two surviving children was present at the probate hearing in this estate held on October 27, 1960, and testified that she was aware of the devise to appellee. Aside from testifying in response to questions by the examiner of inheritance, that appellee was a non-Indian, she made no other comment concerning the devise to him. The decision in Wellknown, upon which appellants rely exclusively for relief, was announced on May 21, 1971. Thus, the record demonstrates that the facts of this matter have been of record for 20 years, and the legal support upon which appellants would proceed has been known for 11 years. No explanation is offered to account for the lapse of time in filing the petition to reopen.

3/ Departmental regulations at 43 CFR 4.242(a) require that: "All grounds for the reopening must be set forth fully. If based on alleged errors of fact, all such allegations shall be under oath and supported by affidavits." The notice of appeal recites decedent was befriended by appellee "for the purpose of ingratiating himself with her with the idea of acquiring some of her undivided property" (Notice of Appeal at 4). The notice goes on to state that appellee "duped" decedent (Notice of Appeal at 4). The notice does not state how these contentions are to be proved. No evidence is suggested in the record on appeal which would tend to prove these conclusions of the appellants. See Estate of Youngman, 10 IBIA 3, 6, 89 I.D. 291 (1982), and Estate of Caye, 9 IBIA 196 (1982), for a full exposition of the requisite showing to be made in support of a petition for reopening sufficient to justify reopening of an estate closed more than 3 years.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

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Jerry F. Muskrat
Administrative Judge